

**James Madison Unknown, August 23, 1795. Draft of letter to unknown correspondent containing the first draft of a petition to the General Assembly of Virginia protesting the Jay Treaty with Great Britain. Transcription: The Writings of James Madison, ed. Gaillard Hunt. New York: G.P. Putnam's Sons, 1900-1910.**

**TO — —1 . MAD. MSS.**

1 The letter is a rough draft and a blank is left in the original for the name of the person to whom it was sent. In the New York Public Library (Lenox) there is another draft, also in Madison's hand, of the greater part of the letter. (See note 1, p. 244.) It is probable, therefore, that the letter was sent in substance to several of Madison's correspondents.

Orange, Augst 23, 1795

Dear Sir

Your favor of the 3d instant did not come to hand till a few days ago, having been probably retarded by the difficulty the post met with in passing the water-courses which have been much swelled of late by excessive rains. It gives me much pleasure to learn that your health has been so much improved; as well as that you are taking advantage of it to cooperate in elucidating the great subject before the public. We see here few of the publications relating to it, except those which issue from meetings of the people, & which are of course republished everywhere. The only Philada paper that comes to me is the

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Aurora wch besides frequent miscarriages, is not I find the vehicle used by the regular champions on either side. I have occasionally seen Dunlap's, & in that some specimens of the Display of the "Features &c." I wish much to see the whole of it. Your obliging promise to forward it along with any other things of the kind, will have a good opportunity by the return of Mr. Wilson Nicholas who is on his way to Phila & will call on me on his way home. I requested the favour of him to apprize you of the opportunity. I am glad to find that the author of the "Features &c." meditates a similar operation on "The Defence of the Treaty by Camillus"<sup>1</sup> who if I mistake not will be betrayed by his anglomany into arguments as vicious & as vulnerable as the Treaty itself. The Resolutions of the Chamber of Commerce in N. Y. justify this anticipation. What can be more absurd than to talk of the advantage of securing the *privileges* of sending raw materials to a manufacturing nation, and of buying merchandizes which are hawked over the four quarters of the globe for customers. To say that we must take the Treaty or be punished with hostilities is something

<sup>1</sup> Hamilton. See the letters in Hamilton's *Works* (Lodge), IV., 371.

still worse. By the way, it is curious to compare the language of the author & abettors of the Treaty, with that held on the subject of our commercial importance, when the Constitution was depending. Jay himself could then view its adoption as the only thing necessary to extort the Posts, &c., and *open the W. India Ports*. (See his address to the people of N. Y. in the Museum.) The Federalist (No. XI) will exhibit a still more striking contrast on this point, in another quarter.—You intimate a wish that I wd. suggest any ideas in relation to the Treaty that may occur to my reflections.<sup>1</sup> In my present sequestered

<sup>1</sup> Among the Madison MSS. is a statement not in Madison's hand, but doubtless written from a draft of his (dated August, 1795), relating to the treaty especially with reference to the British debts. It says that no law of any State passed since the treaty of 1783 had released the American debtor from any of his debts. Delays of payment and insolvencies had taken place. The treaty of 1794, however, settled that he was to bear the consequence of his own laches. Resolved into convenient shape the treaty

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of 1782 provided that the following things were to be done: (1) Great Britain was to acknowledge the absolute independence of the United States. This was the *sine qua non* of opening negotiations. (2) Hostilities were to cease on both sides. (3) Peace was to be an accomplished fact by the delivery to the United States of certain parts of the country then held by Great Britain. This stipulation had not been fulfilled by Great Britain. (4) In evacuating the posts the British forces were to abstain from certain descriptions of injurious acts, which had before taken place upon the evacuation of posts held by them for a time in America. This had not been carried out in the matter of the negroes whom the enemy carried with him when he evacuated. (5) When all of these things had been done, then, and not until then, were the British owners and late owners of certain descriptions of property to meet with no lawful impediment to the recovery of the same. (6) When these stipulations had been carried out, certain persons were to receive the benefit of Congressional recommendations for the recovery of claims against citizens of the United States. (7) There were certain other stipulations affecting national and local rights, such as those concerning the fisheries and the Mississippi, at present untouched.

Great Britain had acknowledged our independence, hostilities had ceased, but she had evacuated but one place (New York) held by her when the treaty was framed, and in doing so had repeated the designated acts of injury from which she was required by the treaty to refrain. Putting this question aside, however, it could be correctly stated that, as long as the armed troops of one country occupied fortified places within the territory of another, peace was not in fact restored, and such being the case the demand of the British debts could not be legally made. A state of war still existed and British creditors were alien enemies, as they must continue to be until the British troops abandoned the posts they invasively occupied.

situation I am too little possessed of the particular turns of the controversy to be able to adapt remarks to them. In general I think it of importance to avoid laying too much stress on minute or doubtful objections which may give an occasion to the other party to divert the public attention from the palpable and decisive ones, and to involve the question in

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uncertainty, if not to claim an apparent victory. The characteristics of the Treaty which I have wished to see more fully laid open to the public view are 1. its ruinous tendency with respect to the carrying trade. The increase of our shipping under the new Govt has, in most legislative discussions, been chiefly ascribed to the advantage given to American vessels by the difference of 10 Per Ct on the impost in their favor. This, in the valuable cargoes from G. B. has been sufficient to check the preference of British Merchts for British bottoms; and it has been not deemed safe hitherto by G. B. to force on a contest with us, in this particular, by any countervailing regulations. In consequence of the Treaty, she will no doubt establish such regulations; and thereby leave the British capital free to prefer British vessels. This will not fail to banish our tonnage from the trade with that Country. And there seems to have been no disposition in the Negociator to do better for our navigation in the W. India trade; especially

if the exclusion of our vessels from the re-exportation of the enumerated articles Sugar Coffee &c be taken into the account. The nature of our exports & imports compared with that of the British, is a sufficient, but at the same time our only defence agst. the superiority of her capital. The advantage they give us in fostering our navigation ought never to have been abandoned. If this view of the subject be just and were presented to the public with mercantile skill, it could not fail to make a deep impression on England. In fact the whole Treaty appears to me to assassinate the interest of that part of the Union.—2 the insidious hostility of the Treaty to France in general; but particularly the operation of the 15th. article, which as far as I have seen has been but faintly touched on, tho it be in fact, pregnant with more mischief than any of them. According to all our other Treaties as well as those of all other nations, the footing of the most favored nations is so qualified, that those entitled to it, must pay the price of any particular privilege that may be granted in a new Treaty. The Treaty of Jay makes every new privilege result to G. B., without her paying any price at all. Should France, Spain, Portugal or any other nation offer the most precious privileges in their trade, as the price of some particular favour in ours, no bargain could be made, unless they would agree, not only to let the same favor be extended to G. B., but extended

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gratuitously. They could not purchase for themselves, without at the same time purchasing for their rival. In this point of view, the 15th. art. may be considered as a direct bar to our Treating with other nations, and particularly with The French Republic. Much has been said of a suspected backwardness to improve our coml. arrangements with France; and a predilection for arrangements with G. B., who had less to give, as well as less inclination to give what she had. It was hardly imagined that we were so soon to grant every thing to G. B. for nothing in return; and to make it a part of this bad bargain with her, that we should not be able to make a good one with any other nation. 3. the spirit in which every point of the law of nations is regulated. It is the interest of the U. S. to enlarge the rights of Neutral nations. It is the general interest of humanity that this shd. be done. In all our other Treaties this policy has prevailed. The same policy has pervaded most of the modern Treaties of other nations. G. B. herself has been forced into it in several of her Treaties. In the Treaty of Jay, every principle of liberality, every consideration of interest has been sacrificed to the arbitrary maxims which govern the policy of G. B. Nay a new principle has been created, in the face of former complaints of our Executive. As well as against the fundamental rights of nations & duties of humanity, for the purpose of aiding the horrible scheme of starving a whole people out of their liberties.

11 Even waiving the merits of the respective complaints & pretensions of the two parties as to the inexecution of the Treaty of peace, the waiver implies that the two parties were to be viewed either as equally culpable or equally blameless; and that the execution of the Treaty of peace equally by both ought now to be provided for. Yet, whilst the U. S. are to comply in the most ample manner with the article unfulfilled by them, and to make compensation for whatever losses may have accrued from the delay; G. B. is released altogether from one of ye articles unfulfilled by her and is not to make the smallest compensation for the damages which have accrued from her delay to execute the other.<sup>2</sup>

1 From this paragraph to the end, the MS. in the New York Public Library (Lenox) is the same, with a few variations indicated in these notes.

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2 In the Lenox MS. this sentence is added: "These equitable and reciprocal claims of the U. S. are not even allowed the chance of arbitration."

The inequality of these terms is still further increased by concessions on the part of the U. S. which, besides adding to the Constitutional difficulties unnecessarily scattered thro' the Treaty, may in a great measure defeat the good consequences of a surrender of the Western posts.<sup>3</sup>

3 The Lenox MS. adds: ". . . if that article of the treaty shd. be faithfully executed by G. Britain."

The British Settlers and Traders, within an undefined Tract of Country, are allowed to retain both their lands and their allegiance at the same time; and consequently to keep up a foreign and unfriendly influence over the Indians within the limits of the U. States.

The Indians within those limits are encouraged to continue their trade with the British by the permission to bring their goods duty free from Canada; where the goods being charged with no such impost as is payable on the goods of the U. S., will be offered for sale with that tempting preference; a regulation but too likely also to cloak the frauds of smuggling traders in a country favorable to them. The reciprocity in this case is ostensible only and fallacious.

Under another ostensible & fallacious reciprocity the advantage secured to the U. S. in the fur trade by their possession of the carrying places is abandoned to the superiority of British Capital, and the inferiority of the Canada duties on imports.

A part only of the ports harbors & bays of a single British Province is made free to the U. S., in consideration of a freedom of all the ports harbors and bays of the whole U. S. The goods and merchandize of the U. S., not entirely prohibited by Canada (but which in fact are always entirely prohibited, when partial & temporary admissions are not dictated by necessity,) may be carried there, in consideration, of a free admission of all goods and

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merchandize from Canada not entirely prohibited by the U. S. (where, in fact there never is this entire prohibition.) A like stipulation, liable to the like observations, is extended to the exports of the U. S. and the Province of Canada. These are further instances of a nominal & delusive reciprocity.

In the case of the Mississippi there is not even an ostensible or nominal reciprocity. The ports and places on its Eastern side, are to be equally free to both the parties; altho' the Treaty itself supposes that the course of the Northern Boundary of the U. S. will throw the British beyond the very source of that river. This item of the Treaty is the more to be noticed, as a repetition and extension of the stipulated privileges of G. B. on the Mississippi, will probably be construed into a partiality in the U. S. to the interests and views of that Nation on the American Continent, not likely to conciliate those from whom an amicable adjustment of the navigation of the Mississippi is to be expected; and were no doubt intended by G. B. as a snare to our good understanding with the nations most jealous of her encroachments & her aggrandizement.

II Without remarking on the explicit provision for redressing past spoliations & vexations, no sufficient precautions are taken against them in future. On the contrary,

By omitting to provide for the respect due to sea letters passports and certificates and for other customary safeguards to neutral vessels, "a general search-warrant, (in the strong but just language of our fellow Citizens of Charlestown) is granted against the American navigation." Examples of such provisions were to be found in our other Treaties, as well as in the Treaties of other nations. And it is matter of just surprise that they should have no place in a Treaty with G. B. whose conduct on the seas so particularly suggested and enforced every guard to our rights that could reasonably be insisted on.

By omitting to provide against the arbitrary seizure & impressment of American seamen, that valuable class of Citizens remains exposed to all the outrages, and our commerce to all the interruptions hitherto suffered from that cause.



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By expressly admitting that provisions are to be held contraband in cases other than when bound to an invested place, and impliedly admitting that such cases exist at present; not only a retrospective sanction may be given to proceedings agst which indemnification is claimed; but an apparent license is granted to fresh and more rapacious depredations on our lawful commerce. And facts seem to shew that such is to be the fruit of the impolitic concession. It is conceived that the pretext set up by G. B., of besieging and starving whole Nations, and the doctrine grounded thereon, of a right to intercept the customary trade of Neutral nations, in articles not contraband, ought never to have been admitted into a Treaty of the U. S.; because 1. it is a general outrage on humanity, and an attack on the useful intercourse of Nations. 2. it appears that the doctrine was denied by the Executive in the discussions with Mr. Hammond, the British Minister, and demands of compensation founded on that denial are now depending. 3 As provisions constitute not less than of our exports, and as Great Britain is nearly half her time at war, an admission of the doctrine sacrifices a correspondent proportion of the value of our commerce. 4. After a public denial of the doctrine, to admit it, in the midst of the present war by a formal Treaty, would have but too much of the effect as well as the appearance of voluntarily concurring in the scheme of distressing a nation in friendship with this Country, and whose relations to it, as well as the struggles for freedom in which they are engaged, give them a title to every good office not strictly forbidden by the duties of neutrality. 5. It is no plea for the measure to hold it up as an alternative to the disgrace of being involuntarily treated in the same manner, without a faculty to redress ourselves; the disgrace of being plundered with impunity agst our consent being under no circumstances, greater than the disgrace of consenting to be plundered with impunity; more especially as the calamity in the former case might not happen in another war, whereas in the latter case it is bound upon us for as much of twelve years, as there may be of war within that period.

By annexing to the implements of war, enumerated as contraband, the articles of ship-timber, tar or rosin, copper in sheets, sails, hemp & Cordage, our neutral rights and national interests are still further narrowed. These articles were excluded by the U. S. from



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the contraband list, when they were themselves in a state of war.<sup>1</sup> Their other Treaties expressly

<sup>1</sup> “See Ordinance regulating captures in 1781.”—Note in Madison's hand.

declare them not to be contraband. British Treaties have done the same. Nor, as is believed, do the Treaties of any nation in Europe, producing these articles for exportation, allow them to be subjects of confiscation. The stipulation was the less to be admitted as the reciprocity assumed by it is a mere cover for the violation of that principle, most of the articles in question, being among the exports of the U. S. whilst all of them are among the imports of G. B.

By expressly stipulating with G. B. against the freedom of enemy's property in neutral bottoms, the progress towards a compleat & formal establishment of a principle in the law of nations so favorable to the general interest and security of Commerce, receives all the check the U. S. could give to it. Reason & experience have long taught the propriety of considering free ships, as giving freedom to their cargoes. The several great maritime nations of Europe have not only established it at different times by their Treaties with each other, but on a solemn occasion (the armed neutrality) jointly declared it to be the law of Nations by a specific compact, of which the U. S. entered their entire approbation.<sup>1</sup> G. B. alone dissented: But she herself, in a variety of prior Treaties, & in a Treaty with France since, [1786], has acceded to the principle. Under these circumstances, the U. S., of all nations, ought to be the last to unite in a retrograde effort on this subject, as being more than any other interested in extending

<sup>1</sup> The Lenox MS. adds: “[See their act of 5 Oct: 1780.]”

& establishing the commercial rights of neutral Nations. Their situation particularly fits them to be carriers for the great nations of Europe during their wars. And both their situation & the genius of their Government & people promise them a greater share of peace and neutrality than can be expected by any other nation. The relation of the U. S. by Treaty on this point to the enemies of G. B. was another reason for avoiding the stipulation. Whilst

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British goods in American vessels are protected agst. French & Dutch capture, it was eno' to leave French & Dutch goods in American Vessels to the ordinary course of Judicial determinations, without a voluntary, a positive, and an invidious provision for condemning them. It has not been overlooked that a clause in the Treaty proposes to renew, at some future period, the discussion of the principle it now settles; but the question is then to be not only in what, but whether in any cases, neutral vessels shall protect enemy's property; and it is to be discussed at the same time, not whether in any, but in what cases provisions & other articles, not bound to invested places, may be treated as contraband. So that when the principle is in favor of the U. S., the principle itself is to be the subject of discussion; when the principle is in favor of G. B., the application of it only is to be the subject of discussion.

III Whenever the law of nations comes into question the result of ye. Treaty accommodates G. B. in relation to one or both of the Republics at war with her, as well as in diminution of the rights and interests of the U. S.

Thus American vessels, bound to G. B. are protected by sea papers agst. French or Dutch searches; bound to France or Holland, are left exposed to British searches, without regard to such papers.

British property in American Vessels is not subject to French or Dutch confiscation: French or Dutch property in American vessels is subjected to British confiscation.

American provisions in American vessels, bound to the Enemies of G. B., are left by Treaty to the seizure and use of G. B.; provisions whether American or not, in American vessels, cannot be touched by the Enemies of G. B.

Timber for ship-building, tar or rosin, copper in sheets, sails, hemp & cordage, bound to the enemies of G. B., for the equipment of vessels of trade only, are contraband; bound to G. B. for the equipment of vessels of war, are not contraband.

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American citizens entering, as volunteers the service of F. or Holland agst. G. B. are to be punished; American volunteers joining the arms of G. B. agst F. or H. are not punishable.

British Ships of war and privateers, with their prizes made on Citizens of Holland, may freely enter & depart the ports of the U. S. Dutch Ships of war and privateers with their prizes made on subjects of G. B.

are to receive no shelter or refuge in the ports of the U. S. And this advantage in war is given to G. B., not by a Treaty prior & having no relation, to an existing war; but by a Treaty made in the midst of war, and prohibiting a like article of Treaty with Holland for equalizing the advantage.

The article prohibiting confiscations & sequestrations, is unequal between the U. S. & G. B. American Citizens have little if any interest in public or bank Stock or in private debts within G. Britain. British subjects have a great interest in all within the U. S. Vessels & merchandize belonging to individuals, governed by the same “confidence in each other & in regard to their respective Govts for their municipal laws, and for the laws of nations allowed to be part thereof as consecrates private debts,” are not exempted from such proceedings. So that where much would be in the power of the U. S. and little in the power of G. B., the power is interdicted. Where more is in the power of G. B. than of the U. S., the power is left unconfined. Another remark is applicable. When the modern usage of nations, is in favor of G. B., the modern usage is the rule of the Treaty. When the modern usage was in favor of the U. S., the modern usage was rejected as a rule for the Treaty.

IV The footing on which the Treaty places the subject of Commerce is liable to insuperable objections.

1. The nature of our exports & imports, compared with those of other Countries, and particularly of G. B., has been thought by the Legislature of the U. S. to justify certain differences in the tonnage & other duties in favor of American bottoms; and the advantage

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possessed by G. B. in her superior capital was thought at the same time to require such countervailing encouragements. Experience has shewn the solidity of both these considerations. The American navigation has, in a degree been protected against the advantage on the side of British Capital, and has increased in proportion. Whilst the nature of our exports, being generally necessities or raw materials, and of our imports consisting mostly of British manufactures, has restrained G. B. from any attempt to counteract the protecting duties afforded to our navigation. Should the Treaty go into effect, this protection is relinquished; Congress are prohibited from substituting any other; and the British Capital, having no longer the present inducement to make use of American Bottoms may be expected, *thro' whatever hands operating*, to give the preference to British Bottoms.

2. The provisions of the Treaty which relate to the W. Indies, where the nature of our exports and imports gives a commanding energy to our just pretensions, instead of alleviating the general evil, are a detail of peculiar humiliations and sacrifices. Nor is a remedy, by any means to be found in the proposed suspension of that part of the Treaty. On the contrary;

If Great Britain should accede to the proposition; and the Treaty be finally established without the twelfth article, she will, in that event, be able to exclude American bottoms altogether from that channel of intercourse, and to regulate the whole trade with the W. Indies in the manner hitherto complained of; whilst by another article of the Treaty, the U. S. are compleatly dispossessed of the right & the means hitherto enjoyed of counteracting the monopoly, unless they submit to a universal infraction of their trade, not excepting with nations whose regulations may be reciprocal and satisfactory.

3. The treaty, not content with these injuries to the U. S. in their commerce with G. B., provides in the XV article against the improvement or preservation of their commerce with other nations, by any beneficial Treaties that may be attainable. The general rule of the U. S. in their Treaties, founded on ye. example of other nations has been, that where a

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nation is to have the privileges that may be granted to the most favored nations, it should be admitted gratuitously to such privileges only as are gratuitously granted; but should pay for privileges not gratuitously granted the compensations paid for them by others. This prudent & equitable qualification of the footing of the most favored nation was particularly requisite in a Treaty with G. B., whose commercial system, being matured & settled, is not likely to be materially varied by grants of new privileges that might result to the U.S. It was particularly requisite at the present juncture also when an advantageous revision of the Treaty with France is said to be favored by that Republic; when a Treaty with Spain is actually in negociation, and Treaties with other nations whose commerce is important to the U. S. cannot be out of contemplation. The proposed Treaty, nevertheless, puts G. B. in all respects, *gratuitously*, on the footing of the most favored nation; even as to future privileges for which the most valuable considerations may be given. So that it is not only out of the power of the U. S. to grant any peculiar privilege to any other nation, as an equivalent for peculiar advantages in commerce or navigation to be granted to the U. S.; but every nation, desiring to treat on this subject with the U. S. is reduced to the alternative either of declining the treaty altogether, or of including G. B., *gratuitously*, in all the privileges it purchases for itself. An article of this import is the greatest obstacle, next to an absolute prohibition, that could have been thrown in the way of other Treaties; and that it was insidiously meant by G. B. to be such, is rendered the less doubtful, by the other kindred features visible in the Treaty.

It can be no apology for these commercial disadvantages, that better terms could not be obtained at the crisis when the Treaty was settled. If proper terms could not be obtained at that time, commercial stipulations, which were no wise essentially connected with the objects of the Envoyship ought to have waited for a more favorable season. Nor is a better apology to be drawn from our other Treaties. The chief of These, were the auxiliaries or the guaranties of our independence, and would have been an equivalent for greater commercial concessions than were insisted on. (Under other circumstances, there is no

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ground to suppose, that the same treaties, tho' more favorable in several material articles than the Treaty in question, would have been embraced by the U. S.<sup>1</sup> )

<sup>1</sup> This sentence does not appear in the Lenox MS.

V A Treaty thus unequal in its conditions, thus derogatory to our national rights, thus insidious in some of its objects, and thus alarming in its operation to the dearest interests of the U. S. in their commerce and navigation, is in its present form unworthy the voluntary acceptance of an Independent people, and is not dictated to them by the circumstances in which providence has kindly placed them. It is sincerely believed, that such a Treaty would not have been listened to at any former period, when G. B. was most at her ease, and the U. S. without the respectability they now enjoy. To pretend that however injurious the Treaty may be it ought to be submitted to in order to avoid the hostile resentment of G. B. which wd. evidently be as impolitic as it would be unjust on her part, is an artifice too contemptible to answer its purpose. It will not easily be supposed, that a refusal to part with our rights without an equivalent will be made the pretext of a war on us; much less that such a pretext will be founded on our refusal to mingle a sacrifice of our commerce & navigation with an adjustment of political differences. Nor is any evidence to be found, either in History or Human nature, that nations, are to be bribed out of a spirit of encroachment & aggressions by humiliations which nourish their pride, or by concessions which extend their resources & power.

To do justice to all nations; to seek it from them by peaceable means in preference to war; and to confide in this policy for avoiding that extremity; or securing the blessing of Heaven, when forced upon us, is the only course of which the United States can never have reason to repent.